APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DATED AND FILED JANUARY 22, 1999

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

In re: WILLIAM C. HINDENLANG,

Debtor.

UNITED STATES OF AMERICA,
Appellant,

v.

WILLIAM C. HINDENLANG,
Appellee.

No. 97-4321

Appeal from the United States District Court
for the Southern District of Ohio at Cincinnati.
No. 97-00372—Sandra S. Beckwith, District Judge.

Argued: October 30, 1998

Decided and Filed: January 22, 1999

Before: DAUGHTREY and MOORE, Circuit Judges;
COHN,* District Judge.

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*The Honorable Avern Cohn, United States District Judge for the Eastern District of Michigan, sitting by designation.

Appendix A

COUNSEL

ARGUED: Robert W. Metzler, U.S. DEPARTMENT OF JUSTICE, APPELLATE SECTION TAX DIVISION, Washington, D.C., for Appellant. William B. Fecher, REISENFELD & STATMAN, Cincinnati, Ohio, for Appellee. **ON BRIEF:** Robert W. Metzler, Kenneth L. Greene, U.S. DEPARTMENT OF JUSTICE, APPELLATE SECTION TAX DIVISION, Washington, D.C., for Appellant. William B. Fecher, Alan J. Statman, REISENFELD & STATMAN, Cincinnati, Ohio, for Appellee.

OPINION

KAREN NELSON MOORE, Circuit Judge. William C. Hindenlang, a Chapter 7 debtor in bankruptcy, seeks to discharge certain federal tax liabilities under 11 U.S.C. § 727. The United States argues that Hindenlang falls under the exceptions to discharge provision in 11 U.S.C. § 523(a)(1)(B), which prohibits discharge of taxes for which the debtor did not file a return. Here, Hindenlang filed Forms 1040 only after the Internal Revenue Service ("IRS") had calculated its own assessment of Hindenlang's liability by its authority under 26 U.S.C. § 6201, after which Hindenlang's late-filed forms served no purpose under tax law, and therefore the United States argues that his Forms 1040 were no longer "returns" under § 523(a)(1)(B). The district court ruled in favor of Hindenlang. We hold that Hindenlang's Forms 1040 were not returns, and we therefore **REVERSE** the judgment of the district court.

Appendix A

I. FACTS AND PROCEDURE

The basic facts are not in dispute. William Hindenlang did not file federal income tax returns for years 1985 through 1988. The IRS sent Hindenlang notice of proposed deficiency letters ("thirty-day letters") for years 1985 through 1987 in April of 1990, and one such letter for the 1988 taxable year in December of 1990. When the debtor did not consent to the proposed liability, the IRS prepared substitute returns ("Substitutes for Returns" or "SFRs") for the relevant years and sent them to Hindenlang. *See* 26 U.S.C. § 6020(b). Again Hindenlang neither responded to nor executed the SFRs, leading the IRS to send out formal notice of deficiency letters ("ninety-day letters").[1] Hindenlang did not file a petition in the Tax Court challenging any of these deficiency notices. Therefore, in 1991, after waiting the statutorily prescribed ninety days, the IRS assessed the deficiencies against Hindenlang.

Finally, in 1993, two years after assessment, Hindenlang sent the IRS what was purported to be individual income tax returns for the years in question.[2] Hindenlang used the proper Forms 1040, *see* 26 C.F.R. § 1.6012-1(a)(6), and calculated the taxes substantially the same as in the SFRs previously prepared by the IRS. Hindenlang still did not pay any of the deficiencies.

On January 22, 1996, Hindenlang filed a Chapter 7 bankruptcy petition. He then instituted an adversary proceeding seeking a bankruptcy court determination that the

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[1] Under 26 U.S.C. §§ 6212(a) and 6213(a), the taxpayer has ninety days after the notice of deficiency to petition the Tax Court for a redetermination of the deficiency, during which time the IRS may not assess the deficiency. Afterwards, the taxpayer must pay the tax and then may sue for a refund. *See* 26 U.S.C. § 7422(a) and 28 U.S.C. § 1346(a).

[2] Hindenlang filed his Forms 1040 as an individual owing taxes as a standard calendar-year taxpayer. Such returns normally must be filed by April 15 following the close of the calendar year. *See* 26 U.S.C. §§ 6012 & 6072.

tax liability in question was dischargeable pursuant to 11 U.S.C. § 727(a).[3] Both parties moved for summary judgment. The bankruptcy court granted summary judgment to Hindenlang, and the district court affirmed. *See United States v. Hindenlang* (*In re Hindenlang*), 214 B.R. 847 (S.D. Ohio 1997).

II. ANALYSIS

Bankruptcy court orders granting summary judgment are final appealable orders and are reviewable by the district court. *See Oakland Gin Co. v. Marlow* (*In re The Julien Company*), 44 F.3d 426, 428 (6th Cir. 1995). We have jurisdiction over bankruptcy appeals pursuant to 28 U.S.C. § 158(d), which authorizes appellate jurisdiction over final decisions of the district courts that reviewed bankruptcy court determinations pursuant to § 158(a).

A. Standard of Review

The issue of whether Forms 1040 filed after the IRS has made an assessment can constitute returns for purposes of § 523(a)(1)(B) is a question of law, to be reviewed de novo. *See Wesbanco Bank Barnesville v. Rafoth* (*In re Baker & Getty Fin. Servs.*), 106 F.3d 1255, 1259 (6th Cir.), *cert. denied*, --- U.S. ---, 118 S. Ct. 65 (1997). For purposes of summary judgment, this court must consider all the relevant facts in a light most favorable to the nonmoving party and determine whether the movant must prevail as a matter of law. *See General Elec. Co. v. G. Siempelkamp GmbH & Co.*, 29 F.3d 1095, 1097 (6th Cir. 1994). There are no material disputed fact issues in this case, so we proceed to the legal issue.

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[3]Under § 727(a), "[t]he court shall grant the debtor a discharge, unless" the debtor falls within any of the applicable exceptions to discharge provisions of the bankruptcy code.

Appendix A

B. Definition of Return Under § 523(a)(1)

The issue in this case is the meaning of the word "return" under § 523(a)(1) of the Bankruptcy Code. The section reads:

> (a) A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt —
>
> (1) for a tax or a customs duty —
>
> (A) of the kind and for the periods specified in section 507(a)(2) or 507(a)(8) of this title, whether or not a claim for such tax was filed or allowed;
>
> (B) with respect to which a *return*, if required —
>
> (i) was not filed; or
>
> (ii) was filed after the date on which such return was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition; or
>
> (C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax.

11 U.S.C. § 523(a)(1) (emphasis added).

Under this provision, when a debtor files for bankruptcy, "tax on or measured by income or gross receipts" for the last three taxable years is not dischargeable. *See* 11 U.S.C. §§ 507(a)(8)(A), 523(a)(1)(A). Furthermore, only taxes for which a return was filed more than two years before the petition for bankruptcy are dischargeable. *See* § 523(a)(1)(B)(ii). Finally, if "the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax," the tax is not dischargeable. *See* § 523(a)(1)(C).

This provision appears to serve two purposes. First, the requirement of a two-year waiting period after filing a late return but before seeking discharge prevents a debtor who has ignored the filing requirements of the Internal Revenue Code from waiting until the eve of bankruptcy, filing a delayed but

standard tax return form, and seeking discharge the next day. It is, in a sense, a provision affording notice and an opportunity to act, giving the IRS time to seek payment by levy or court proceeding. Second, § 523 forbids discharge when the debtor has acted fraudulently or in a manner calculated to evade or defeat a tax. This corresponds with the notion that "good faith and candor are necessary prerequisites to obtaining a fresh start." *Industrial Ins. Servs., Inc. v. Zick* (*In re Zick*), 931 F.2d 1124, 1129 (6th Cir. 1991) (citation omitted).

Hindenlang filed Forms 1040 for the years in question after the IRS had already made independent assessments of his tax liability. He waited the requisite two years required by § 523 before filing for bankruptcy. The government does not claim that the Forms 1040 were fraudulent in any respect. Finally, the government does not attempt to argue that the act of filing late Forms 1040, however delinquent, could be construed as an attempt to evade or defeat taxes due under § 523(a)(1)(C). The government's argument is that once a taxpayer has been assessed a deficiency, a Form 1040 submitted by the taxpayer to the IRS no longer qualifies as a return under § 523(a)(1)(B). We are left, therefore, with the threshold question of what constitutes a return under § 523(a)(1)(B) of the Bankruptcy Code.

We think it is appropriate to look to the Internal Revenue Code to determine the proper definition of return. The Bankruptcy Code simply adopts the term "return" without defining it further, and there is no reason to presume the Bankruptcy Code sought to encompass as a return any document, form, paper, or the like that would not qualify as a return under the applicable tax law.[4]

The Internal Revenue Code, which liberally uses the concept of returns, does not formally define "return." Under

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[4]We do not address the issue of the definition of return for purposes of § 523(a)(1)(B) when a taxpayer seeks to discharge state, municipal, or other tax liability.

26 U.S.C. § 6011(a), titled the "[g]eneral requirement of return, statement, or list," the Code provides:

> [w]hen required by regulations prescribed by the Secretary any person made liable for any tax imposed by this title, or with respect to the collection thereof, shall make a return or statement according to the forms and regulations prescribed by the Secretary. Every person required to make a return or statement shall include therein the information required by such forms or regulations.

See also 26 C.F.R. § 1.6011-1(a), (b). Most individuals are required to file returns. *See* 26 U.S.C. § 6012. As the Supreme Court has stated, "[t]he purpose [of the return] is not alone to get tax information in some form but also to get it with such uniformity, completeness, and arrangement that the physical task of handling and verifying returns may be readily accomplished." *Commissioner v. Lane-Wells Co.*, 321 U.S. 219, 223 (1944). "[I]t is clear that the existing tax system could not function properly if the great majority of taxpayers did not report the correct amount of tax without the government's prior determination of tax liability." BERNARD WOLFMAN, JAMES P. HOLDEN, KENNETH L. HARRIS, STANDARDS OF TAX PRACTICE § 201 (1995). Although the general view is that substantial compliance is sufficient to comply with the law, *see* BORIS I. BITTKER & MARTIN J. MCMAHON, JR., FEDERAL INCOME TAXATION OF INDIVIDUALS § 40.1 (1988), the Internal Revenue Code does not specifically set out how accurate, thorough, or complete the requisite form must be in order to qualify as a return under the many sections of the Code that reference a return. The Code also does not specify when a late tax form will no longer qualify as a return under the tax law.

The district court applied a four-part test to determine whether a filing with the IRS constitutes a "return." In order for a document to qualify as a return: "(1) it must purport to be a return; (2) it must be executed under penalty of perjury; (3) it must contain sufficient data to allow calculation of tax; and (4) it must represent an honest and reasonable attempt to

satisfy the requirements of the tax law." *Hindenlang*, 214 B.R. at 848.

This test was derived from two Supreme Court cases: *Germantown Trust Co. v. Commissioner*, 309 U.S. 304 (1940), and *Zellerbach Paper Co. v. Helvering*, 293 U.S. 172 (1934). In *Germantown*, the Court was asked to decide whether a fiduciary Form 1041 filed by the petitioner, that stated no tax was due, qualified as a return under § 275(a) of the Revenue Act of 1932. *Id.* at 306. The determination would control the onset of the limitations period for assessing a deficiency. *Id.* at 307. The Court held "that where a fiduciary, in good faith, makes what it deems the appropriate return, which discloses all of the data from which the tax . . . can be computed," a proper return has been filed. *Id.* at 309. The Court in *Zellerbach*, also discussing the date at which the limitations period against the IRS begins to run for deficiency assessments, held that "[p]erfect accuracy or completeness is not necessary to rescue a return from nullity, if it purports to be a return, is sworn to as such, and evinces an honest and genuine endeavor to satisfy the law." 293 U.S. at 180.

The Tax Court, in *Beard v. Commissioner*, 82 T.C. 766 (1984), *aff'd*, 793 F.2d 139 (6th Cir. 1986), combined the principles of *Zellerbach* and *Germantown* to arrive at the four-part test quoted above. *See* 82 T.C. at 777. A number of bankruptcy courts, and others, have since adopted or approved of this basic format. *See, e.g., Billman v. Internal Revenue Serv.* (*In re Billman*), 221 B.R. 281, 282 (Bankr. S.D. Fla. 1998); *Pierchoski v. Internal Revenue Serv.* (*In re Pierchoski*), 220 B.R. 20, 24-25 (Bankr. W.D. Pa. 1998); *McGrath v. United States* (*In re McGrath*), 217 B.R. 389, 392 (Bankr. N.D.N.Y. 1997). *See also* 13 MERTENS, THE LAW OF FEDERAL INCOME TAX § 47.50 (1992) (citing *Zellerbach* and listing the same four-part test). Both parties in this case, and the district court below, applied the *Beard* test to define "return," and we will adopt it as the applicable test.

We next apply the four-part test to this case. First, there is no question that the Forms 1040 submitted by Hindenlang purported to be returns. Hindenlang used the proper form

required by IRS regulations and filed the completed forms with the IRS. Second, Hindenlang executed these forms under penalty of perjury. Third, the forms included all the data needed to calculate Hindenlang's tax liability. Indeed, as indicated above, the forms were simply mirror images of the Substitutes for Returns completed by the IRS. The disputed issue is whether Hindenlang's Forms 1040, filed after the IRS had made a formal assessment, "represent an honest and reasonable attempt to satisfy the requirements of the tax law." *Hindenlang*, 214 B.R. at 848.

The Bankruptcy Code does permit debtors who have filed late returns to obtain discharges of tax liability in certain situations. Even in this case, the IRS does not challenge the discharge of Hindenlang's 1989-91 taxes, for which Forms 1040 were also filed first in 1992, because no assessment had been made by the IRS. The district court rejected the government's contention that once an assessment has been made, this presumption of discharge even in the case of late-filed returns no longer stands, and the Form 1040 filed post-assessment is not a return as a matter of law. The district court concluded instead that a properly completed Form 1040, even one first filed after an assessment has been made, requires the government, as the party seeking an exception to discharge, to bring forward particularized evidence to show that Hindenlang's late-filed Forms 1040 did not constitute an honest attempt to comply with the tax law. *See Hindenlang*, 214 B.R. at 849. The district court then held that the government failed to meet this particularized evidence burden.

We disagree with the district court's conclusion that the burden of showing dishonesty under the fourth prong of the *Beard* test shifts to the government if the debtor files a facially valid IRS Form 1040 after IRS assessment. Although we agree that the burden of proving by a preponderance of the evidence an exception to discharge lies with the creditor, *see Grogan v. Garner*, 498 U.S. 279, 287 (1991); *Fegeley v. United States*, 118 F.3d 979, 983 (3d Cir. 1997), and that "exceptions to discharge are to be strictly construed in favor

of the debtor," *Fegeley*, 118 F.3d at 983, we hold that the government has met its burden in this case. We hold as a matter of law that a Form 1040 is not a return if it no longer serves any tax purpose or has any effect under the Internal Revenue Code. A purported return filed too late to have any effect at all under the Internal Revenue Code cannot constitute "an honest and reasonable attempt to satisfy the requirements of the tax law." Once the government shows that a Form 1040 submitted after an assessment can serve no purpose under the tax law, the government has met its burden.[5]

The district court concluded that the government must bring forth particularized evidence to show that the taxpayer did not file the Form 1040 in an honest and good faith attempt to comply with the tax law, even after an assessment has been made. *See Hindenlang*, 214 B.R. at 849. We conclude, however, that when the debtor has failed to respond to both the thirty-day and the ninety-day deficiency letters sent by the IRS, and the government has assessed the deficiency, then the Forms 1040 serve no tax purpose, and the government thereby has met its burden of showing that the debtor's actions were not an honest and reasonable effort to satisfy the tax law.[6]

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[5]The government suggests a hypothetical situation where a Form 1040 filed after assessment by the IRS could serve a tax law purpose. The government argues that if a taxpayer were to file a Form 1040 after an assessment, the document would constitute a return to the extent that it resulted in a higher tax obligation than the assessment, and presumably that additional amount would be dischargeable. The crux of this theory is that this hypothetical taxpayer made a good faith attempt to comply with the tax law to the extent of the additionally calculated tax. We are not faced with this issue and need not resolve it at this time.

[6]Our decision is not inconsistent with the Supreme Court's holding in *Badaracco v. Commissioner*, 464 U.S. 386 (1984). In *Badaracco*, the Court held that an amended and corrected return filed after a fraudulent return does not trigger the three-year statute of limitations for assessment under 26 U.S.C. § 6501(a). *Id.* at 394. Instead, once a false or fraudulent return has been filed, under § 6501(c)(1) the three-year statute of limitations is irrevocably tolled. *Id.* The Court specifically noted that *Zellerbach* did not render the fraudulent return a nullity. In *Badaracco*,

Hindenlang has not indicated any tax purpose under the Internal Revenue Code for filing his Forms 1040. Although filing a return commences a three-year statute of limitations on the Secretary's authority to enter an assessment, *see* 26 U.S.C. § 6501(a), a document purporting to be a return but filed after the assessment has already been made is too late to have any effect on this limitation. Furthermore, the Internal Revenue Code's ten-year limitation on the IRS's right to collect on the assessment through levy or judicial proceeding begins at the moment the assessment is made, regardless of whether a return was filed. *See* 26 U.S.C. § 6502(a)(1).

Hindenlang's purported return also would have failed to mitigate or absolve him from civil or criminal liability had the IRS sought to impose such liability. Willful failure to file a timely return is a misdemeanor under 26 U.S.C. § 7203. Late filing of a return or a document purporting to be a return does not remove this criminal liability. Failure to file a return without reasonable cause also subjects a delinquent taxpayer to a five-percent penalty per month up to a maximum of twenty-five percent of the taxes owed. *See* 26 U.S.C. § 6651(a)(1). Hindenlang filed his Forms 1040 with the IRS well past any time that would bring him under the twenty-five-percent maximum.

Under Hindenlang's theory, a person filing a Form 1040 after assessment would be better off in bankruptcy than someone who did not, even though the Form 1040 serves no tax purpose. Nothing in § 523(a)(1) of the Bankruptcy Code suggests that a document that does not qualify as a return under the Internal Revenue Code should nonetheless qualify as a return for purposes of bankruptcy discharge. Such a result would create an unjustifiable inconsistency in the law. We conclude that 11 U.S.C. § 523(a)(1), which refers to tax returns that are required by the Internal Revenue Code to be

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however, the Supreme Court refused to allow the taxpayers to declare their fraudulent filings null and void and thereby erase an undesirable consequence of their fraudulent acts.

filed, sought to encompass only those documents that would qualify as returns under the Internal Revenue Code.

We conclude that if a document purporting to be a tax return serves no purpose at all under the Internal Revenue Code, such a document cannot, as a matter of law, qualify as an honest and reasonable attempt to satisfy the requirements of the tax law.[7] Therefore the document is not a "return" for purposes of 11 U.S.C. § 523(a)(1)(B).

III. CONCLUSION

For the reasons stated above, we **REVERSE** the judgment of the district court.

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[7] We do not conclude that were Hindenlang able to show a tax purpose for filing a Form 1040 after the IRS has made an assessment, he would automatically satisfy the fourth prong of the *Beard* test. The government could still produce particularized evidence showing that such a late filing of a Form 1040 was neither an honest nor reasonable attempt to comply with the tax law. We save resolution of that hypothetical case for another day.

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION DATED AND FILED SEPTEMBER 10, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

(Bankruptcy Case No. 96-10250)

Case No. C-1-97-372

In re William C. Hindenlang,

Debtor.

United States of America,

Appellant,

v.

William C. Hindenlang,

Appellee.

OPINION and ORDER

This appeal from the February 24, 1997, decision of the United States Bankruptcy Court presents the following issue: whether the Bankruptcy Court correctly decided that Forms 1040 submitted by the Debtor for the tax years 1985 through 1988, after the Internal Revenue Service had assessed

deficiencies for those years, are tax returns that entitle the Debtor to a discharge for the corresponding tax liabilities. For the reasons that follow, the Court **AFFIRMS** the Bankruptcy Court's decision awarding summary judgment to the Debtor.

1. *Background*

The Debtor failed to file federal income tax returns for the tax years 1985 through 1988, *inter alia*. In 1991, the Internal Revenue Service assessed deficiencies for those years. Still, the Debtor did not pay the deficiencies. On December 3, 1993, the Debtor filed Forms 1040 for the tax years 1985 through 1988, without payment for the deficiencies reflected on the documents. On January 22, 1996, the Debtor filed his petition for relief pursuant to chapter 7 of the United States Bankruptcy Code.

After the Debtor filed his petition for relief, the parties filed cross-motions for summary judgment with respect to the dischargeability of the Debtor's tax deficiencies for the tax years 1985 through 1988. The Bankruptcy Court granted the Debtor's motion and denied Appellant's motion on the ground that the deficiencies were dischargeable pursuant to 11 U.S.C. §727(b) and none of the exceptions to dischargeability found in 11 U.S.C. §523(a) applied. Appellant appeals from that decision.

2. *Standard of Review*

The parties agree that this appeal presents a legal question and that the Court must undertake a *de novo* review. *See*

Appendix B

Baker & Getty Financial Services v. Rafoth, 106 F.3d 1255, 1259 (6th Cir. 1997).

3. *Analysis*

Appellant contends that the Bankruptcy Court erred in not concluding that the exception to dischargeability found at 11 U.S.C. §523(a)(1)(B) prevented the discharge of the Debtor's tax liability with respect to tax years 1985 through 1988. Pursuant to that exception

> (a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) [of Title 11] does not discharge an individual debtor from any debt —
>
> (1) for a tax or a customs duty —
>
> * * *
>
> (B) with respect to which a return, if required —
>
> (i) was not filed.

Appellant contends that, while the Bankruptcy Code does not define the word "return," application of the definition of that term provided in *Germantown Trust Co. v. Commissioner*, 309 U.S. 304 (1944), establishes that the Forms 1040 filed by the Debtor on December 3, 1993, were not returns. Accordingly, Appellant argues, the Debtor did not file a return with respect to the 1985 through 1988 tax

years and is not entitled to a discharge of his tax liability for those tax years.

The parties agree that the definition of "return" as that word is used in 11 U.S.C. §523(a)(1)(B) is the one set forth in the *Germantown Trust* decision. In order to qualify as a return, a document must satisfy the following four criteria:

(1) it must purport to be a return;

(2) it must be executed under penalty of perjury;

(3) it must contain sufficient data to allow calculation of tax; and

(4) it must represent an honest and reasonable attempt to satisfy the requirements of the tax law.

Germantown Trust, 309 U.S. at 306-09.

As the party seeking an exception to discharge, Appellant bore the burden of proof with respect to the applicability of the §523(a)(1)(B)(i) exception before the Bankruptcy Court. *See Grogan v. Garner*, 498 U.S. 279, 291 (1991). As the party bearing the burden of proof, Appellant was required to introduce evidence in support of its claim of exception to dischargeability in order to avoid the entry of summary judgment in favor of the Debtor. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

The basis of Appellant's appeal is the fourth *Germantown Trust* criterion: that a document is not a return unless it

represents an honest and reasonable attempt to satisfy the requirements of the tax laws. Appellant argues, in essence, that the Bankruptcy Court erred in concluding that the Forms 1040 filed by the Debtor on December 3, 1993, satisfied that requirement.

Before the Bankruptcy Court, Appellant sought a ruling as a matter of law on a factual issue, the honesty and reasonableness of the Debtor and his actions, but did not introduce evidence that would tend to prove that the Debtors' actions were not honest and reasonable attempts to satisfy the requirements of the tax laws. Appellant represented there, as it does here, that the Debtor has stated that he did not file the documents in December 1993 in an effort to comply with the tax laws but in order to avail himself of the discharge of the deficiencies in bankruptcy. Appellant did not, and does not, cite to any evidence in support of that representation, however. The Court has combed through the exhibits attached to Appellant's motion for summary judgment filed in the Bankruptcy Court and does not find the statement Appellant attributes to the Debtor.[1]

Absent evidence to support its contention that the fourth *Germantown Trust* criterion is not satisfied, Appellant could only defeat the Debtor's motion for summary judgment by establishing, as a matter of law, that no debtor filing what purports to be a return after the Internal Revenue Service has

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1. The copy of the transcript of the Debtor's deposition that Appellant filed with its motion for summary judgment includes only every other page of that transcript. In any event, Appellant did not refer the Bankruptcy Court to that transcript for the statement it attributes to the Debtor.

assessed a deficiency for the tax year in question could satisfy the fourth *Germantown Trust* criterion. Appellant offers no support for such a broad conclusion, and this Court does not conclude that such a delayed filing will always fail to satisfy the fourth *Germantown Trust* criterion. Accordingly, the Court concludes that Appellant failed to introduce evidence in support of a claim with respect to which it bore the burden of proof and failed to demonstrate that the claim was established as a matter of law. The Bankruptcy Court, thus, correctly awarded summary judgment to the Debtor.

4. *Conclusion*

For the foregoing reasons, the February 24, 1997, decision of the United States Bankruptcy Court is hereby **AFFIRMED.**

IT IS SO ORDERED.

s/ Sandra S. Beckwith
Sandra S. Beckwith
United States District Judge

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION DATED AND FILED SEPTEMBER 10, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

C-1-97-372

In re William C Hindenlang

Debtor

United States of America

Appellant

v.

William C Hindenlang

Appellee

JUDGMENT IN A CIVIL CASE

Decision by Court: This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT THE DECISION OF THE US BANKRUPTCY COURT TO AWARD SUMMARY JUDGMENT TO THE DEBTOR IS **AFFIRMED**.

Appendix C

THIS CASE IS TERMINATED PURSUANT TO ORDER OF THE COURT [DOC. 10].

September 10, 1997

Kenneth Murphy, Clerk
s/ [illegible]
Deputy Clerk

APPENDIX D — DECISION OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT DATED AND FILED FEBRUARY 24, 1997

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 96-10250
Adv. No. 96-1028
Chapter 7

Judge Burton Perlman

In Re:

WILLIAM C. HINDENLANG

Debtor

WILLIAM C. HINDENLANG

Plaintiff

v.

UNITED STATES OF AMERICA

Defendant

Appendix D

DECISION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

At Cincinnati, in said District, on February 24, 1997.

This adversary proceeding relates to the dischargeability of certain federal income tax debts in the plaintiff/debtor's Chapter 7 bankruptcy case filed on January 22, 1996. This court has jurisdiction of this matter pursuant to 28 U.S.C. §1334(b) and the General Order of Reference entered in this District. This is a core proceeding arising under 28 U.S.C. §157(b)(2)(F).

The plaintiff's complaint in this adversary proceeding requests a determination of the dischargeability of his federal income tax liability. In this complaint, plaintiff asserts that the following tax debts to the Internal Revenue Service ("IRS") were listed in his schedules and are dischargeable:

1985 –	$14,949.26
1986 –	21,621.64
1987 –	12,043.47
1988 –	16,879.65
1989 –	5,916.12
1991 –	4,524.61
1992 –	890.49

Plaintiff asserts in his complaint that he filed with the IRS the requested returns for the above years at least three years prior to the filing of his bankruptcy petition. Thus, he contends that the taxes are dischargeable under 11 U.S.C. §727(a). In response, IRS answers that any taxes due are

nondischargeable pursuant to 11 U.S.C. §523(a)(1), contending first, that the document filed by plaintiff cannot be regarded as a tax return, and, second, that the plaintiff's failure to file his 1985-1988 tax returns prior to being assessed by the IRS for those taxes prevents consideration of what was filed as being a tax return. The parties are now in agreement that the tax liabilities for 1989 and 1991 are dischargeable, and that the tax liability for 1992 is nondischargeable under 11 U.S.C. §523(a)(1) as a tax that was due within three years prior to the petition date.

Now before the court are cross-motions for summary judgment on the dischargeability of the tax liability for the years 1985-1988, and the parties' responses thereto. With his motion for summary judgment, plaintiff/debtor filed copies of amended Forms 1040 for the years here in controversy, 1985 through 1989. (In a Stipulation filed with the court, Document 14 in the file, the parties agree that these were received by IRS on December 6, 1993.) With its motion, IRS filed a number of exhibits, including the same forms submitted by plaintiff, and also Certificates of Assessment for each of the years 1985-1988 and also 1992; "30-day Letters" with attached proposed tax and penalties for each of the years 1985-1988; Notices of Deficiency for years 1985-1987; and a transcript of the deposition of plaintiff.

We find the following facts. The plaintiff did not timely file tax returns for the years 1985-1988. The IRS sent "30-day letters" to the plaintiff requesting that the plaintiff consent to the taxes which the IRS calculated with "Substitutes for Return" or explain why the tax liabilities should be different from the calculated amounts. These letters were sent on April

12, 1990 for the tax years 1985 and 1986, April 26, 1990 for the tax year 1987, and December 31, 1990 for the tax year 1988. The IRS then sent Notices of Deficiency to the plaintiff between August and December of 1990 requesting again that the plaintiff consent to its calculation of the taxes, or, in the alternative, that the plaintiff file a petition in the U. S. Tax Court within 90 days to avoid assessment of the taxes as calculated by the IRS. The plaintiff filed tax returns for the years 1985-1988 received by IRS on December 6, 1993. The documents filed by the plaintiff on December 6, 1993, were substantially similar to the "Substitutes for Return" earlier prepared by IRS. The parties have agreed that plaintiff's taxes for 1989 and 1991 are dischargeable, and that for 1992 is nondischargeable. What remains in issue is dischargeability of taxes for 1985, 1986, 1987 and 1988.

On these facts, plaintiff argues that the tax liability for the years 1985-1988 is dischargeable under 11 U.S.C. §727(a) because there is no basis for excepting the tax debt from discharge under 11 U.S.C. §523(a)(1). Plaintiff states that he filed tax returns for years 1985-1988 in December of 1993. He contends that because he actually filed returns and because this filing was more than two years prior to the filing of his bankruptcy petition the exceptions to discharge in §523(a)(1) do not apply. In addition, he contends that the exceptions incorporated into §523(a)(1) from 11 U.S.C. §507(a)(8) do not apply since the taxes from 1985-1988 were due more than three years prior to the petition date.

Addressing the dischargeability of the tax liability for the years 1985-1988, IRS contends in its memorandum that the taxes are nondischargeable under 11 U.S.C.

§523(a)(1)(B)(i) on the basis that no returns were filed by plaintiff. IRS argues that the documents which were received by IRS on December 6, 1993, were not returns because they were based on the IRS SFRs and were not self-assessed by plaintiff. Further, IRS asserts that because plaintiff's returns were filed after IRS assessed plaintiff's tax liability, plaintiff's right to file a return was extinguished, what plaintiff filed cannot be regarded as a return, and plaintiff's tax liability must be excepted from discharge under §523(a)(1)(B)(i).

A motion for summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c), made applicable in bankruptcy by Fed.R.Bankr.P. 7056. The moving party bears the initial burden of showing that there is no issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-324, 106 S.Ct. 2548, 2552-2553 (1986).

Under §523(a)(1)(A) of the Bankruptcy Code, taxes are excepted from discharge if they first became due within three years of the date of the bankruptcy petition. *See* 11 U.S.C. §507(a)(8). Section 523(a)(1)(B) further excepts from discharge taxes:

> **§ 523. Exceptions to discharge**
>
> (a) A discharge under section 721, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt —

Appendix D

(1) for a tax or a customs duty —

(B) with respect to which a return, if required —

(i) was not filed; or

(ii) was filed after the date on which such return was last due, under applicable law or under any extension, and after two years before the date of filing of the petition.

The burden of proving that a debt is nondischargeable is on the party opposing discharge, here IRS. *In re Black*, 787 F.2d 503, 505 (10th Cir. 1986).

The first position of IRS with which we deal is its contention that, since the filings of tax returns were not based on self-assessment, they should not be regarded as tax returns. We hold this position to be without merit. Supreme Court precedent establishes that a proper return must have the following attributes: (1) it must purport to be a return; (2) it must be sworn to as such; (3) it must contain sufficient data to allow calculation of tax; and (4) it must appear on its face to constitute an honest and genuine endeavor to satisfy the law. *See Germantown Trust Co. v. Comm'r*, 309 U.S. 304,

60 S.Ct. 566 (1940); *Zellerbach Paper Co. v. Helvering*, 293 U.S. 172, 55 S.Ct. 127 (1934); *see also Beard v. Comm'r*, 82 T.C. 766 (1984), *aff'd*, 793 F.2d 139 (6th Cir. 1986).

The IRS does not appear to dispute that the returns submitted by plaintiff in 1993 were proper Forms 1040, were executed and sworn to by plaintiff, contained sufficient information to calculate the tax and were not facially irregular or otherwise fraudulent. In fact, the IRS accepted similar Forms 1040 for the years 1989 through 1992, which were filed on the same day as the Forms 1040 for the years 1985 through 1988. Moreover, the IRS does not assert that the form or substance of the returns interfered with the handling or verification of the tax returns. The first position of IRS fails.

The cases upon which IRS relies for a contrary conclusion in its first position we find unpersuasive. The case of *In re Arenson*, 134 B.R. 934 (Bankr. D. Neb. 1991) is distinguishable because in debtor's amended return after assessment, he contended that he had no liability whatever, while in the case at hand debtor admitted significant tax liability. Moreover, it is unclear whether the holding is based on infirmity in the type of forms filed, or untimeliness of the forms. In *In re Pruitt*, 107 B.R. 764 (Bankr. D. Wyo. 1989), debtor filed no return at all, so that case is simply inapposite to that before us here.

We turn then to the contention of IRS that plaintiff's amended returns should not be regarded as returns for dischargeability purposes because they were filed after the IRS had assessed his taxes for 1985-1988 and issued SFRs for those years. We find this contention also to be without

merit. When a statute is clear in its plain language, the court need not go any further in interpretation of the statute. *United States v. Ron Pair Enterprises*, 489 U.S. 235, 242, 109 S.Ct. 1026, 1031 (1989). The position of the IRS would result in this court placing a significant additional requirement on the taxpayer to avoid nondischargeability, that is, filing a return prior to assessment. Such a requirement is not expressed in the statute, and we will not interpret the statute to so require for a few additional reasons. *See In re Sullivan*, 200 B.R. 327, 331 (Bankr. N.D. Ohio 1996) ("The legislative history . . . suggests no reason to apply section 523(a)(1)(B) other than in accord with the ordinary meaning of its language").

First, we must start from the proposition that exceptions to discharge are to be narrowly construed. *In re Ward*, 857 F.2d 1082, 1083 (6th Cir. 1988) ("Exceptions to dischargeability are to be construed strictly"); *Werner v. Hofmann*, 5 F.3d 1170, 1172 (8th Cir. 1993); *In re Enis*, 149 B.R. 471, 474 (Bankr. N.D. Ohio 1992). Further, the IRS's argument requires a departure from the strict statutory language of §523(a)(1)(B)(i) which does not base the discharge of taxes on whether a return was filed prior to assessment. Such departures have been disfavored in the context of dischargeability of taxes. *See e.g., In re Smith*, 96 F.3d 800, 802 (6th Cir. 1996) ("We have been rather consistent in denying 'equitable' pleas to disregard the strict timing rules of the Tax and Bankruptcy Codes").

Second, 11 U.S.C. §523(a)(1)(B)(ii) provides a time requirement for filing a return for dischargeability purposes. In this section, the "2-year rule", Congress dealt specifically with the issue of when a return must be filed in order for the

tax liability for that year to be dischargeable. The section requires filing of a return more than two years prior to the petition date. The section makes nondischargeable any tax from a required return which:

> (ii) was filed after the date on which such return was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition;

11 U.S.C. §523(a)(1)(B)(ii).

This 2-year rule sets a time line which debtors must observe to gain discharge of their taxes. The section does not include any language concerning the assessment of the tax. Instead, the section creates a bright-line rule which says that if the debtor's return was filed less than two years pre-petition, the associated taxes are nondischargeable. Congress chose not to place significance on the time of assessment. This intent is clear when considering that Congress was aware of the role of assessment in dischargeability by virtue of the requirements of 11 U.S.C. §507(a)(8)(A)(ii). The inclusion of assessment in this section, but not in §523(a)(1)(B), suggests that Congress intended to allow filing of returns regardless of whether assessment has occurred. *Lynch v. Johns-Manville Sales*, 710 F.2d 1194, 1197 (6th Cir. 1983) ("It is a fundamental rule of statutory construction that inclusion in one part of a congressional scheme of that which is excluded from another part reflects a congressional intent that the exclusion was not inadvertent").

In reaching the conclusion which we do, we find strong support in the decision of Judge David Snow in *In re Sullivan*,

200 B.R. 327 (Bankr. N.D. Ohio 1996). In *Sullivan*, the IRS sought to except from discharge taxes for years in which returns were not filed until after the 90-day period for filing a petition in the U.S. Tax Court had run, but prior to the assessment of the taxes by IRS. In *Sullivan*, IRS asserted an argument similar to that asserted here — tax returns filed after the period for challenging IRS's determination of tax liability are legally ineffective and therefore not returns for dischargeability purposes. The court expressly refused to address the exact question presently before this court, whether returns filed after assessment are "returns" for dischargeability purposes. *Id.* at 332. However, the reasoning of the court in *Sullivan* is helpful in the analysis of the present case.

The court in *Sullivan* rejected the IRS argument that a return filed after the 90-day period for the debtor to contest the IRS determination of debtor's tax liability was not a return for dischargeability purposes. *Id.* In reaching this conclusion, the court found that neither the plain language of §523(a)(1)(B), nor the legislative history of that section, was helpful to the IRS position that the time the debtor filed his return was critical in determining whether it was a "return" for dischargeability purposes. *Id.*

We perceive a balance in the dischargeability of taxes which should not be disturbed by the requirement which the IRS asks this court to impose upon debtors. The court in *Sullivan* identified this balance by stating:

> Section 523(a) reflects a compromise between conflicting objectives of bankruptcy and tax

> law — providing the debtor a fresh start and enforcing tax collections. The obligation for recent taxes is not dischargeable even though the debtor has filed all returns and paid all taxes to the extent of his ability. On the other hand old taxes are dischargeable unless the debtor is guilty of fraud or has willfully attempted to avoid or defeat the tax, 11 U.S.C. §523(a)(1)(C), or has failed to file a required return. 11 U.S.C. §523 (a)(1)(B)(i). In the latter situation, the debtor may still discharge the taxes in question if he files a late return and if more than two years expire before he files his bankruptcy case. *Id.*

Sullivan, 200 B.R. at 331.

We conclude, therefore, that the second ground of IRS for nondischargeability is without merit.

The authorities relied upon by IRS in support of its contention here under discussion are distinguishable. To support its argument that the documents filed by the plaintiff were not returns because they were filed after the time to self-assess, IRS cites *Blenheim v. Commissioner*, 125 F.2d 906, 910 (4th Cir. 1942) and *Plunkett v. Commissioner*, 118 F.2d 644, 650 (1st Cir. 1941). In *Blenheim*, the court applied a federal taxing statute applicable to foreign corporations. The court found that since the taxpayer did not timely file a return, it could not enjoy the benefits of the deductions and credits generally provided to foreign corporations. 125 F.2d at 910. In *Plunkett*, the court held that the taxpayer could not avoid penalties incurred due to nonfiling by simply filing a

late return. 118 F.2d at 650. Clearly, neither case stands for the proposition asserted by IRS in the present case. Further, no citations to the Internal Revenue Code for this proposition have been provided.

Additionally, IRS relies on the following cases, cases which we also find to be unpersuasive. The court in *In re Gentry*, 1995 WL 644045 (Bankr. M.D. Tenn. 1995) held in a brief, unreported decision, that the debtor submitted his returns "too late" to qualify as returns for discharge purposes; however, the court did not discuss the significance of the IRS assessment in making its determination that the returns were filed too late. *Id.* In *In re Gushue*, 126 B.R. 202 (Bankr. E.D. (Pa. 1991), the court found that a stipulated decision entered in the U.S. Tax Court did not constitute a return for purposes of §523(a)(1). The basis for the decision was not the timeliness of the filing, but the adequacy of the stipulation as a return. 126 B.R. at 204.

In light of the foregoing discussion, we hold that the plaintiff's tax liability for the years 1985 through 1988 is discharged. Thus, plaintiff's Motion for Summary Judgment will be granted and defendant's Motion for Summary Judgment will be denied.

s/ Burton Perlman
BURTON PERLMAN
U. S. BANKRUPTCY JUDGE

APPENDIX E — JUDGMENT ON DECISION OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION DATED AND FILED FEBRUARY 24, 1997

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. 96-10250
Adv. No. 96-1028
Chapter 7

Judge Burton Perlman

In Re:

WILLIAM C. HINDENLANG

Debtor

WILLIAM C. HINDENLANG

Plaintiff

v.

UNITED STATES OF AMERICA

Defendant

JUDGMENT ON DECISION BY THE COURT

This proceeding having come on for hearing before the court, Honorable Burton Perlman, United States Bankruptcy

Judge, presiding, and the issues having been duly heard and a decision having been rendered,

It is Ordered and Adjudged that plaintiff's tax liabilities for the years 1989 and 1991 are dischargeable, and that the plaintiff's tax liability for the year 1992 is nondischargeable, and,

It is further Ordered and Adjudged that the motion of plaintiff for summary judgment that plaintiff's taxes for 1985, 1986, 1987 and 1988 are dischargeable is granted, and the motion of defendant on behalf of the IRS is denied.

s/ Burton Perlman
BURTON PERLMAN
U. S. BANKRUPTCY JUDGE